Suwiri Sdn Bhd v Government of the State of Sabah

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–9 OF 2006(S)
AHMAD FAIRUZ CHIEF JUSTICE, HASHIM YUSOFF AND AZMEL MAAMOR FCJJ
21 AUGUST 2007

Civil Procedure — Jurisdiction — Court of Appeal — Whether Court of Appeal can re-open finding of the trial judge on quantum of damages when figure and evidence presented not even disputed or challenged at first instance and on appeal to Court of Appeal

Contract — Agreement to extract timber — Whether letter from civil servant created a valid and binding contract to extend timber licence — Whether secretary of Hasil Bumi can for and on behalf of the Sabah State Government approve or grant any rights in or over a forest reserve or state land in Sabah

The appellant (the plaintiff at first instance) was granted a licence to fell and extract timber in a forest reserve in Keningau in the State of Sabah comprising an area of 5,665.59 hectares. The said licence was valid for a period of five years from 13 March 1993 to 13 March 1998. As the appellant was unable to extract the timber in the said area within the period stated in the licence an application for extension of time was made to the Setiausaha Hasil Bumi. The reason given by the appellant for not being able to complete the extraction was due to rainy weather and poor road condition.

The Setiausaha Hasil Bumi, in his letter dated 25 November 1997 to the Director of Forestry stated that he agreed to have the said licence renewed for the whole of the concession area of 5,665.59 hectares for a period until 31 December 1999 but subject to a survey being carried out by the Director of Forestry and also to the provision of the Sabah Forestry Enactment 1968.

Contrary to what had been indicated by the Setiausaha Hasil Bumi, the respondent instead of renewing the extension, decided to issue a new licence to the appellant reducing the concession area to 2,204.41 hectares. The remaining area of 3,461.18 hectares was distributed to three other companies under separate licences.

Being dissatisfied with the decision of the respondent, the appellant initiated proceedings in the High Court at Kota Kinabalu against the respondent claiming damages for breach of contract and other declaratory reliefs. At the

High Court, the learned trial judge allowed the appellant's claim with costs and awarded damages in the sum of RM21,890,133.75 with interest thereon at the rate of 8% per annum from the date of judgment until full settlement. On an appeal by the respondent, the Court of Appeal by a majority decision reversed the decision of the High Court and ordered that the appellant's claims be dismissed with costs.

Held, dismissing the appeal:

(1) Section 3 of the Government Contracts Act 1949 will apply where the state government is made a party to the contract. The granting of timber licence in Sabah falls under s 15 of the Sabah Forest Enactment 1968 (the 'Enactment') and is in accordance with s 3 of the Government Contracts Act 1949 (see paras 7–9).

(2) For a public officer (Setiausaha Hasil Bumi) to legally be allowed to enter into such a contract, s 3 of the Government Contracts Act 1949 must be satisfied. Section 3 clearly states that the public officer must show that he has the written authorization of the Chief or State Minister before he could act on behalf of the respondent (see para 9).

(3) Without the necessary written authorization of the Minister, such actions would be void and invalid. There was no evidence adduced by the appellant before this court or at the courts below to show that the Setiausaha Hasil Bumi had been granted with such written authorization to act on behalf of the Sabah State Government. Therefore, it simply means that the Setiausaha Hasil Bumi had not been delegated with the authority to act for the respondent (see para 9).

(4) The doctrine of privity of contract states that as a general rule, a contract cannot confer rights or impose obligations on strangers ie persons who are not parties to it (see para 10).

(5) The letter of approval dated 25 November 1997 relied upon by the appellant was actually a letter written by the Setiausaha Hasil Bumi to the Director of Forestry indicating his approval to renew the appellant's timber licence was in fact an internal communication between the Setiausaha Hasil Bumi to the Director of Forestry and was not copied to the appellant. Therefore, the appellant who is regarded being as a stranger to such communication was not a party to the alleged letter of approval. Following the doctrine of privity of contract, the appellant would have no locus or right to enforce the content of the alleged letter of approval in favour of the appellant (see para 11).

(6) Further, the letter of approval dated 25 November 1997 relied upon by the appellant was conditional in that it contained two conditions, the

crucial condition being that the approval was 'subject to the provisions of the Enactment, which in turn requires the Minister to give his approval. Therefore, the court arrived at the finding that the letter of approval signed by the Setiausaha Hasil Bumi, who, without the necessary written authorization of the Minister, had not created any rights whatsoever to the appellant nor any obligations on the respondent (see paras 8–9).

[Bahasa Malaysia summary

Perayu (plaintif pada mulanya) telah diberikan lesen untuk menebang dan mengeluarkan balak dalam hutan simpan di Keningau dalam negeri Sabah yang mempunyai keluasan 5,665.59 hektar. Lesen tersebut adalah sah untuk tempoh lima tahun dari 13 Mac 1993 sehingga 13 Mac 1998. Memandangkan perayu tidak berupaya untuk mengeluarkan balak dalam kawasan tersebut dalam tempoh masa yang dinyatakan dalam lesen satu permohonan untuk melanjutkan masa telah dibuat kepada Setiausaha Hasil Bumi. Sebab yang diberikan oleh perayu kerana tidak berupaya menyelesaikan pengeluaran adalah kerana cuaca hujan dan keadaan jalan yang teruk.

Setiausaha Hasil Bumi dalam suratnya bertarikh 25 November 1997 kepada Pengarah Perhutanan, menyatakan bahawa beliau bersetuju agar lesen tersebut diperbaharui untuk keseluruhan konsesi kawasan 5,665.59 hektar untuk tempoh sehingga 13 Disember 1999 tetapi tertakluk kepada penilaian dijalankan oleh Pengarah Perhutanan dan juga peruntukkan Enakmen Perhutanan Sabah 1968.

Bertentangan dengan apa yang dinyatakan oleh Setiausaha Hasil Bumi, Responden bukannya memperbaharui perlanjutan, sebaliknya membuat keputusan untuk mengeluarkan lesen baru kepada perayu selain mengurangkan kawasan konsesi kepada 2,204.41 hektar. Baki kawasan 3,461.18 hektar telah dibahagikan kepada tiga syarikat di bawah lesen berasingan.

Kerana tidak berpuas hati dengan keputusan responden, perayu telah memulakan prosiding dalam Mahkamah Tinggi Kota Kinabalu terhadap responden menuntut ganti rugi kerana memungkiri kontrak dan relief perisytiharan yang lain. Di Mahkamah Tinggi, hakim bicara terpelajar membenarkan tuntutan perayu dengan kos dan mengawardkan ganti rugi berjumlah RM21,890,133.75 dengan faedah selanjutnya pada kadar 8% setahun daripada tarikh penghakiman sehingga penyelesaian sepenuhnya. Semasa rayuan oleh responden, Mahkamah Rayuan dengan keputusan majoriti mengakaskan keputusan Mahkamah Tinggi dan memerintahkan tuntutan perayu ditolak dengan kos.

Diputuskan, menolak rayuan:

(1) Seksyen 3 Akta Kontrak Kerajaan 1949 akan terpakai apabila kerajaan negeri adalah pihak kepada kontrak. Pemberian lesen balak di Sabah tertakluk kepada s 15 Enakmen Perhutanan Sabah 1968 ('Enakmen') dan adalah menurut s 3 Akta Kontrak Kerajaan 1949 (lihat perenggan 7,8 & 9).

(2) Bagi penjawat awam (Setiausaha Hasil Bumi) untuk dibenarkan dari segi perundangan memasuki kontrak sedemikian, s 3 Akta Kontrak Kerajaan 1949 hendaklah dipenuhi. Seksyen 3 dengan jelasnya menyatakan bahawa penjawat awam hendaklah menunjukkan bahawa beliau diberikan kuasa secara bertulis oleh Ketua atau Menteri Negeri sebelum beliau bertindak bagi pihak responden (lihat perenggan 9).

(3) Tanpa diberikan kuasa secara bertulis oleh Menteri, sesuatu tindakan akan menjadi batal dan tidak sah. Tidak ada sebarang bukti yang dikemukakan oleh perayu di hadapan mahkamah ini atau mahkamah di bawah bagi menunjukkan bahawa Setiausaha Hasil Bumi telah diberikan sebarang surat kuasa secara bertulis untuk bertindak bagi pihak Kerajaan Negeri Sabah. Oleh itu, secara ringkasnya ia bermaksud bahawa Setiausaha Hasil Bumi tidak diberikan sebarang kuasa untuk bertindak bagi pihak responden (lihat perenggan 9).

(4) Doktrin kontrak priviti menyatakan bahawa sebagai peraturan biasa, sesuatu kontrak tidak boleh memindahkan hak atau mengenakan kewajipan kepada orang yang tidak dikenali iaitu orang yang bukan pihak kepadanya (lihat perenggann 10).

(5) Surat kelulusan bertarikh 25 November 1997 yang digunakan oleh perayu sebenarnya adalah surat yang ditulis oleh Setiausaha Hasil Bumi kepada Pengarah Perhutanan menyatakan kelulusannya untuk memperbaharui lesen pembalakan perayu adalah secara faktanya adalah komunikasi dalaman antara Setiausaha Hasil Bumi kepada Pengarah Perhutanan dan tidak diberikan salinannya kepada perayu. Oleh itu, perayu diumpamakan sebagai orang yang tidak dikenali untuk komunikasi tersebut dan bukannnya pihak kepada surat yang dikatakan sebagai surat kebenaran. Menurut doktrin kontrak priviti, perayu tidak mempunyai locus atau hak untuk menguatkuasakan kandungan surat kebenaran kepada perayu (lihat perenggan 11).

(6) Selanjutnya, surat kebenaran bertarikh 25 November 1997 yang digunakan oleh perayu adalah mengandungi dua syarat, syarat utama adalah 'tertakluk kepada peruntukkan Enakmen, yang memerlukan Menteri memberikan kebenaran. Oleh itu, mahkamah telah mencapai kepada penemuan bahawa surat kebenaran yang ditandatangani oleh Setiausaha Hasil Bumi, yang, tanpa diberikan kuasa secara bertulis oleh

A Menteri, tidak mencipta sebarang hak kepada perayu atau kewajipan ke atas responden (lihat perenggan 8 & 9).]

Notes

For cases on agreement to extract timber generally, see 3(1) *Mallal's Digest* B (4th Ed, 2006 Reissue) paras 2435–2439.

For cases on jurisdiction of Court of Appeal, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4381–4383.

Cases referred to

C *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (refd)

Dunlop Pneumatic Tyre Co. Ltd v Selfridae & Co Ltd [1915] AC 847 (refd)

Schmidt v Kepong Prospecting Ltd & Ors [1964] MLJ 416 (refd)

D **Legislation referred to**

Contracts Act 1950 s 66

Government Contracts Act 1949 s 3

Sabah Forestry Enactment 1968 s 15

E *Marina Tiu (Yap Chin & Tiu) for the appellant.*

Juprin Wong-Adamal (Senior State Counsel, State AG's Chambers, Sabah) for the respondent.

Ahmad Fairuz Chief Justice (delivering judgment of the court):

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[1] The Federal Court granted leave to the appellant to appeal to the Federal Court based on the following questions namely:

(1) Whether the Setiausaha Hasil Bumi for and on behalf of the Sabah G State Government has the authority to approve the granting of any rights in or over a forest reserve or state land in Sabah;

(2) Whether a letter of approval signed by the Setiausaha Hasil Bumi and communicated to the appellant created a binding contract to renew or extend the timber licence; and

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(3) Whether it is open to the Court of Appeal to reopen the finding of the trial judge on quantum of damages when the figure and evidence presented were not even disputed or challenged by the respondent at the Court of first instance and even at the Court of Appeal.

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[2] The appellant (the plaintiff in the court of first instance) was granted a licence to fell and extract timber in a forest reserve in Keningau in the state of Sabah comprising an area of 5,665.59 hectares. The said licence was valid for a period of five years from 13 March 1993 to 13 March 1998. Because

the appellant was unable to extract the timber in the said area within the period stated in the licence, an application for extension of time was made to the Setiausaha Hasil Bumi, Datuk William Shim. The reason given for not being able to complete the extraction was due to rainy weather and poor road condition.

[3] The Setiausaha Hasil Bumi, in his letter dated 25 November 1997 to the Director of Forestry stated that he agreed to have the said licence renewed for the whole of the concession area of 5,665.59 hectares for a period until 31 December 1999 but subject to a survey being carried out by the Director of Forestry and also to the provision of the Sabah Forestry Enactment 1968.

[4] Contrary to what had been indicated by the Setiausaha Hasil Bumi, the respondent instead of renewing the extension, decided to issue a new licence to the appellant reducing the concession area to 2,204.41 hectares. The remaining area of 3,461.18 hectares was distributed to three other companies under separate licences. Being dissatisfied with the decision of the respondent, the appellant initiated a proceeding in the High Court at Kota Kinabalu against the respondent claiming damages for breach of contract and other declaratory reliefs.

[5] At the High Court, the learned trial judge allowed the appellant's claim with costs and awarded damages in the sum of RM21,890,133.75 with interest thereon at the rate of 8% per annum from the date of judgment until full settlement.

[6] On an appeal by the respondent, the Court of Appeal by a majority decision reversed the decision of the High Court and ordered that the appellant's claims be dismissed with costs. Hence, this appeal to the court.

THE FIRST QUESTION

[7] In a contract where the State Government is involved as a party the provision of s 3 Government Contracts Act 1949 ('the 1949 Act') is applicable. The application of the 1949 Act had been extended to Sabah and Sarawak on 16 September 1963. Section 3 of the 1949 Act reads:

3. CONTRACT ON BEHALF OF A STATE GOVERNMENT

(1) All contracts made in Malaysia on behalf of a State Government shall, if reduced in writing, be made in the name of the State Government of the State, or by any public officer duly authorized in writing by the Chief Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.

A (2) In the application of this section to Sabah and Sarawak 'Chief Minister' includes any State Minister (emphasis added).

[8] The timber licence in Sabah is issued under s 15 of the Sabah Forest B Enactment 1968 (the Enactment). It states:

(1) Save as otherwise provided in this Enactment and notwithstanding the provisions of any other State law, no right of any description in or over a Forest Reserve or any part thereof shall be acquired except by virtue, and in accordance with the terms of, a licence agreement entered into by the Minister with the C approval of the Cabinet or of a licence.

(1A) A licence agreement entered into by the Minister under sub-section (1) of this section may provide for the planting of forest or timber trees upon such terms and conditions as may be agreed.

D (2) Any licence agreement entered into by the Minister under this section shall be subject to any admitted rights or conceded privileges and any special conditions attaching to the Forest Reserve concerned under the provisions of this Enactment, but subject thereto, where any provision of such licence agreement is inconsistent with any provision of this Enactment compliance with the provisions of such E licence agreement shall be deemed to be compliance with the provisions of this Enactment:

Provided that no licence shall be issued or no licence agreement shall be entered into under this Enactment in respect of Forest Reserves of Class 1, Class VI and Class VII.

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[9] Hence the entry of the contract for the timber licence by the Minister with the appellant under s 15 of the Enactment was in conformity with the requirements of s 3 of the 1949 Act. The focal issue that needs consideration now is under what circumstances can a public officer be legally authorized to G enter into such a contract for timber licence with the appellant. In our view, it can only be done if the requirements of s 3 of the 1949 Act are satisfied. In other words, the public officer must obtain the authorization of the Minister in writing to act on behalf of the State Government. To apply those requirements as stipulated by s 3 of the 1949 Act to the instant case, the H Setiausaha Hasil Bumi, a public officer, must show that he has the written authorization of the Minister before he could act on behalf of the respondent on any dealing over the said Forest Reserve. Without the necessary written authorization of the Minister then his action would be void and invalid. There was nothing before us nor at the courts below any evidence adduced I by the appellant to show that the Setiausaha Hasil Bumi had been granted with such written authorization to act on behalf of the Sabah State Government. Therefore, it simply means that the Setiausaha Hasil Bumi had

not been delegated with the authority to act for the respondent. In the circumstances, our answer to the first question would be in the negative.

THE SECOND QUESTION

[10] The doctrine of privity of contract is that as a general rule, a contract cannot confer rights or impose obligations on strangers to it, i.e persons who are not parties to it.

[11] The letter of approval relied upon by the appellant was actually a letter written by the Setiausaha Hasil Bumi to the Director of Forestry indicating his approval to renew the appellant's timber licence. The letter, dated 25 November 1997 (exh P5) was in fact an internal communication between the Setiausaha Hasil Bumi to the Director of Forestry, not copied to the appellant, but some how or other the appellant had managed to obtain a copy. The content of the letter states:

(2) Syarikat Suwiri Sdn Bhd memohon supaya Lesen Hutan No JP(NNN) 042/93(SP) seluas 5,665.59 hektar di Sg Talangkai diperbaharui.

(3) Permohonan ini telah pun dirujuk kepada tuan dan permohonan disyor-kan diperbaharui bagi kawasan seluas 2,204.41 hektar sahaja melalui surat Bil: JP(P &P)00/02/01/3/142/26 bertarikh 29 Ogos 1997.

(4) Setelah permohonan ini dikaji dan keatas penjelasan seperti surat Bil SWR/KPPW/97/11/1-001 bertarikh 13 November 1997 yang dialamatkan kepada Ketua Pegawai Perhutanan Wilayah Keningau dan latar belakang aktiviti pembalakan yang dijalankan dalam kup 1993 (JP(NNN)042/93(SP) dan kup 1994 (JP(NNN)042/92(SP) permohonan syarikat untuk membaharui keseluruhan kawasan seluas 5,665.59 hektar adalah dipersetujui tertakluk kepada kajian lapang oleh pihak tuan *dan tertakluk kepada peruntukan-peruntukan Enakmen Hutan 1968*. Lesen hutan yang akan dikeluarkan adalah bagi tempoh sehingga 31 December 1999

(Emphasis added.)

[12] Firstly, the alleged approval letter was in fact an internal communication between the Setiausaha Hasil Bumi and the Director of Forestry. It was not even copied to the appellant. Such being the position the appellant is regarded as a stranger to such communication. In other words, the appellant was not a party to the alleged letter of approval. Based on the doctrine of privity of contract, the appellant would have no locus or right to enforce the content of the alleged letter of approval in favour of the appellant.

[13] The principle in *Dunlop Pneumatic Tyre Co Ltd v Selfridae & Co Ltd* [1915] AC 847 is a clear example on the rule of privity of contract. The House of Lords in this case stated:

> ... In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.

[14] In *Schmidt v Kepong Prospecting Ltd & Ors* [1964] MLJ 416 the Federal Court recognized the application of the doctrine of privity of contract in Malaysia that a person who is not a party to a contract cannot take advantage of provisions of the contract. In this case, the appellant assisted one Tan to obtain a prospecting permit where Tan promised to pay the appellant a tribute of 1% of the selling price of iron sold. Subsequently an agreement in 1954 was made between a company and Tan under which the company took over Tan's obligation to pay the 1% tribute. The appellant was not a party to this agreement. In 1955, an agreement was made between the company and the appellant where the company agreed to pay the appellant the 1% tribute. The appellant claimed for the tribute but the company argued that the 1954 agreement was not enforceable as the appellant was not a party to it. The Federal Court agreed with the company where the 1954 agreement could be enforced only by the company or Tan; who were the only parties to the contract.

[15] In another case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 the appellants were the registered co-owners of a piece of Malay reserve land in Tampin. The appellants in assisting their business associate, one Ismail Omar, charged their land to the respondent ('bank') to furnish security for Ismail Omar's personal loan. After the loan was disbursed, Ismail Omar breached the loan agreement and the respondent foreclosed the third party security and obtained an order for sale of the property. The appellants successfully applied and had the order of sale declared null and void on the ground that they were in violation of the prohibition imposed by s 13 of the Malay Reservations Enactment. The respondent then filed an application before the same judge for a declaration that the appellants, having received a benefit from the respondent pursuant to s 66 of the Contracts Act 1950 ('the Act') were liable to repay the outstanding amount owing to the respondent. Section 66 of the Act states:

66 OBLIGATION OF PERSON WHO HAS RECEIVED ADVANTAGE UNDER VOID AGREEMENT OR CONTRACT THAT BECOMES VOID

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[16] One of the issues raised was whether s 66 of the Act could be invoked against the appellants. The Federal Court held that s 66 of the Act could not be invoked against the appellants because they were not the recipients of the loan and they were not parties to the loan agreement with the respondent.

[17] On the basis of the principle as stated above, the respondent could not be under an obligation to be bound by the terms of the alleged approval letter because the Setiausaha Hasil Bumi had no legal capacity to act on behalf of the respondent. It is not in dispute that when he wrote the impugned letter to the Director of Forestry the Setiausaha Hasil Bumi signed it in his capacity as the Setiausaha Hasil Bumi and not acting for and on behalf of the Minister. As we have discussed earlier, the Setiausaha Hasil Bumi can only act lawfully if he obtains the necessary written authorization from the Minister. He had no such written authorization.

[18] Secondly, the approval given by the Setiausaha Hasil Bumi was not unconditional. It contained two conditions. The more crucial condition is that such approval was to be 'tertakluk kepada peruntukan-peruntukan Enakmen Hutan 1968'. The glaringly relevant provision of the 1968 Enactment is that it requires the Minister to issue the approval letter. There is no provision in the 1968 Enactment which empowers the Setiausaha Hasil Bumi to issue such approved letter, nor was there any written authorization of the Minister allowing the Setiausaha Hasil Bumi to issue such approval letter.

[19] For the reasons as mentioned above we arrived at the finding that the letter of approval signed by the Setiausaha Hasil Bumi, who, without the necessary written authorization of the Minister, had not created any rights whatsoever to the appellant nor any obligations on the respondent. In the circumstances, our answer to the second question is also in the negative.

THE THIRD QUESTION

[20] The natural effect of our negative answers to the first and second questions is that the respondent could not be liable to the appellant based on the letter of approval issued by the Setiausaha Hasil Bumi. It follows therefore

A payment of damages does not arise. Hence, it is not necessary for us to answer the third question because to do so would be an act of futility which this court must refrain from doing so.

Appeal disemissed..

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Reported by Dipendra Harshad Rai

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